



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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Ref: 8WP-CWQ

MAR 23 2018

Mr. Peter Wax
Division of Water Quality
North Dakota Department of Health
918 East Divide Avenue, 4th Floor
P.O. Box 1947
Bismarck, North Dakota 58501-1947

Re: EPA Comments on Triennial Review of North Dakota's Water Quality Standards

Dear Mr. Wax:

This letter provides comments of the U.S. Environmental Protection Agency for the public comment period on the triennial review of North Dakota's water quality standards (WQS). As you may know, in August 2015 the EPA revised the WQS regulation (40 CFR Part 131).¹ The previous regulation had been in place since 1983. The following key program areas are addressed in the final rule: (1) triennial reviews of state and tribal WQS, (2) provisions authorizing the use of schedules of compliance for water quality-based effluent limits (WQBELs) in National Pollutant Discharge Elimination System (NPDES) permits, (3) WQS variances, (4) designated uses for water bodies, (5) antidegradation requirements, and (6) the EPA Administrator's determinations that new or revised water quality standards are necessary. The revised regulation became effective on October 20, 2015. In addition, the EPA published *Priorities for Water Quality Standards and Criteria Programs, FY 2017-2018* for states and tribes to consider.² The comments below identify opportunities to align North Dakota's WQS with the revised EPA regulation and make other program improvements.

Triennial Reviews

Public Hearings

The triennial review requirement in the EPA WQS regulation (40 CFR § 131.20(a)) was updated to clarify the required scope for each review. Specifically, the EPA clarified that states and authorized tribes must from time to time, but at least once every three years, hold public hearings that allow for public input on all applicable WQS adopted into state or tribal law pursuant to 40 CFR §131.10 - §131.15, as well as any federally promulgated WQS. The final rule also clarified a public hearing is required when (1) reviewing WQS per §131.20(a) and (b); (2) when revising WQS as a result of reviewing WQS per §131.20(a) and (b); and (3) whenever revising WQS, regardless of whether the revision is a result of triennial review per §131.20(a) and (b). The State's January 10, 2018 public notice solicited comments on proposed amendments to the Standards of Quality for Waters of the State, N.D.

¹ See 80 Fed. Reg. 51020 (August 21, 2015). This notice and supplemental materials are available at <http://www.epa.gov/wqs-tech/final-rulemaking-update-national-water-quality-standards-regulation>.

² Available at: <https://www.epa.gov/wqs-tech/priorities-water-quality-criteria-and-standards-programs-fy-2017-2018>.

Admin. Code ch. 33-16-02.1. ND held its public hearing on March 12, 2018. The EPA recommends NDDH review state law for any conflicts with the requirements of 40 CFR §131.20 and 40 CFR Part 25 and ensure the public participation requirements for the triennial review is consistent with these requirements.

New or Updated Section 304(a) Criteria Recommendations

One of the updates to the EPA's WQS regulation requires states and authorized tribes to provide an explanation if not adopting new or revised criteria for parameters for which the EPA has published new or updated Clean Water Act (CWA) section 304(a) criteria recommendations (40 CFR § 131.20(a)). This change was made to foster meaningful and transparent involvement of the public and intergovernmental coordination with local, state, federal, and tribal entities in light of recent science provided by EPA through its criteria recommendations. The EPA will not approve or disapprove this explanation. For North Dakota's current triennial review, the state will need to provide explanations where new or revised criteria are not adopted for parameters where EPA has published new or updated CWA section 304(a) criteria recommendations since May 30, 2000, regardless of whether the criteria are more stringent or less stringent than the state's applicable criteria. The EPA provided a list of those parameters that have been published between May 30, 2000 and August 21, 2015.³ Since the publication of this list, the EPA also published updated CWA section 304(a) aquatic life criteria recommendations for cadmium.⁴

The EPA notes that for several of the parameters for which EPA has published new/updated section 304(a) human health criteria recommendations, North Dakota has adopted the more stringent Maximum Contaminant Level (MCL) established by the EPA under the Safe Drinking Water Act. The EPA supports retaining MCLs where they are more stringent than the Section 304(a) criteria. For a pollutant for which the EPA has not published a recommended section 304(a) criterion for "water and organisms" and for which the EPA has promulgated a Maximum Contaminant Level Goal (MCLG), the EPA generally recommend the MCLG for noncarcinogenic pollutants, or a criterion derived by recalculating the MCLG at an acceptable cancer risk level. The EPA does not recommend that the MCL be used where consideration of available treatment technology, costs, or availability of analytical methodologies has resulted in a MCL that is less protective than a MCLG.⁵ The EPA recommends North Dakota review the criteria in 33-16-02.1, Table 2, that are based on a MCL to ensure consistency with the recommendations above.

Compliance Schedule Authorizing Provision

The EPA's WQS regulation requires that if states intend to authorize the use of compliance schedules for water quality-based effluent limits in NPDES permits, the state must adopt a permit compliance schedule authorizing provision and submit it to the EPA for review and action under Clean Water Act § 303. 40 CFR §§ 131.5(a)(5), 131.15; 80 Fed. Reg. 51020, 51041-51042 (August 21, 2015). North Dakota proposed to adopt a compliance schedule authorizing provision at 33-16-02.1-05. EPA recommends revising the first sentence to read "A North Dakota pollutant discharge elimination system

³ See <https://wcms.epa.gov/sites/production/files/2015-08/documents/supplement-information-cwa-304a-2015.pdf>.

⁴ See <https://www.epa.gov/sites/production/files/2016-03/documents/cadmium-final-factsheet.pdf>.

⁵ See 65 Fed. Reg. 66444, 66450-66451 (November 3, 2000) available at <https://www.gpo.gov/fdsys/pkg/FR-2000-11-03/pdf/00-27924.pdf>.

(NPDES) permit may contain a schedule of compliance leading to the return of a permittee into compliance with water quality-based effluent limits consistent with federal and state rules” to clarify that compliance schedules may only be used for water quality-based effluent limitations. Compliance schedules cannot be used for technology-based effluent limitations. 40 CFR § 122.47.

Variances

The new EPA WQS rule added 40 CFR §131.14 that explicitly authorizes the use of WQS variances when the applicable designated uses are not attainable in the near-term, but may be attainable in the future. The rule also includes additional requirements such as information that a state or authorized tribe must adopt in any WQS variance, including the highest attainable condition. States and authorized tribes must submit supporting documentation to the EPA that demonstrates why the WQS variance is needed and justifies the term and interim requirements. WQS variances longer than five years must be reevaluated at least every five years after EPA approval with an opportunity for public input. For further information regarding the new requirements for variances please see 40 CFR §131.14 and 80 Fed. Reg. at 51035-51041.

North Dakota articulates its WQS variance policy at chapter 33-16-02.1-05. This provision does not include all of the federal requirements at 40 CFR § 131.14. The EPA recommends that North Dakota revise chapter 33-16-02.1-05 to state “A variance will be granted only after fulfillment of the requirements at 40 CFR §131.14, including public participation requirements and EPA approval.”

Creation of North Dakota Department of Environmental Quality

As indicated in North Dakota’s Notice of Intent to Amend and Adopt Administrative Rules Relating to Standards of Quality for Waters of the State, the proposed rulemaking also implements Senate Bill Number 2327 concerning the creation of the North Dakota Department of Environmental Quality (NDDEQ). The Environmental Health Section Chief, who is authorized under S.L. 2017, ch. 199, §1 (S.B. 2327) to adopt rules for the NDDEQ, is proposing to adopt the NDDH’s Standards of Quality for Waters of the State, N.D. Admin. Code ch. 33-16-02.1, including the proposed amendments, as the NDDEQ’s Standards of Quality for Waters of the State, N.D. Admin. Code ch. 33.1-16-02.1. The proposed NDDEQ rules contain minor edits to reflect the creation of the new agency and transfer water quality standards authority to NDDEQ. If adopted, the proposed NDDEQ rules will be effective upon establishment of the NDDEQ, as specified in S.L. 2017, ch. 199, §1 (S.B. 2327). Given the unique circumstances in this instance, it would be appropriate for North Dakota to add a delayed effective date in NDDEQ’s Standards of Quality for Waters of the State to ensure a streamlined transfer of the WQS authorities from the Department of Health to the NDDEQ upon creation.

Conclusion

We thank the Division of Water Quality for its efforts to maintain and improve water quality in North Dakota. Please note that our positions are preliminary in nature and should not be interpreted as final

EPA decisions under CWA § 303(c). If you have any questions, please contact Holly Wirick of my staff at (303) 312-6238 or wirick.holiday@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra D. Spence". The signature is fluid and cursive, with the first name "Sandra" being more prominent than the last name "Spence".

Sandra D. Spence, Manager
Water Quality Unit